Supreme Court, U.S.
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NO.

In The

Supreme Court of the United States

October Term, 1995

ELOISE MCGEE,
Petitioner,

VERSUS

HOLMES COUNTY, MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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December 19, 1994

16 pp

QUESTIONS PRESENTED

1. Whether a local government may be held liable for judicial policy decision of its judge in an action under 42 USC § 1983.

2. Whether a county may be held liable for the unconstitutional act of its judge in setting excessive bail.

TABLE OF CONTENTS

PAGE

Questions Presented i
Table of Contents ii
Table of Authorities iii
Opinion Below 1
Jurisdiction 1
Federal Statute Involved 2
Statement of the Case 2
Argument

THIS COURT SHOULD REVIEW THIS CASE SINCE THE FIFTH CIRCUIT'S HOLDING IN *JOHNSON V. MOORE*, 952 F. 2D 92 (5TH CIR. 1992), THAT A LOCAL GOVERNMENT IS NOT LIABLE FOR THE JUDICIAL POLICY ACTS OF ITS JUDGE IS INCONSISTENT BOTH WITH *PEMBAUR V. CITY OF CINCINNATI*, 475 U.S. 469 (1986) AND WITH *OWEN V. CITY OF INDEPENDENCE*, 445 U.S. 662 (1980) 3

Appendix 8

TABLE OF AUTHORITIES

CASES **PAGE**

Felder v. Casey, 487 U.S. 131 (1988).....4

Imbler v. Pachtman, 424 U.S. 409 (1976).....5

Johnson v. Moore, 952 F. 2d 92 (5th Cir. 1992).....passim

Mireles v. Waco, 502 U.S. ___, 116 L. Ed. 2d 9 (1991).....4, 6

Owen v. City of Independence, 445 U.S. 662 (1980).....3, 6

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).....3, 5, 6

Stump v. Sparkman, 435 U.S. 349 (1978).....4, 6

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution Amendment Eight.....passim

FEDERAL STATUTE INVOLVED

42 USC § 1983.....passim

OTHER AUTHORITIES

Miss. Code Ann., § 99-3-7.....4, 5

Miss. Code Ann., § 99-5-11.....4, 5

Miss. Code Ann., § 99-11-2.....4

Mississippi Constitution, § 171.....4

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is unreported. It is attached as an appendix. The opinion below is unreported since it is a mere restatement of the Fifth Circuit rule that a local subdivision cannot be held responsible for the judicial acts of its judge. *Johnson v. Moore*, 952 F. 2d 92 (5th Cir. 1992).

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on September 23, 1994. This Court has jurisdiction to review by Writ of Certiorari under 28 USC § 1254.

FEDERAL STATUTE INVOLVED

The federal statute involved is 42 USC § 1983, which says:

> Every person who, under color of any statute, ordinance, regulation, custom or uses of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured in an action at law, suit in equity or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner, Eloise McGee, filed a 42 USC § 1983 suit in the United States District Court for the Southern District of Mississippi. She alleged that Holmes County, Mississippi is liable to her for damages for the acts of its Justice Court Judge in setting excessive bail. Record at ("R") 1-2, 90-92.

McGee was arrested on December 4, 1991 under a warrant issued by a Holmes County Justice Court Judge. Without making any "meaningful inquiry" into the proper amount of bail, the judge arbitrarily set bail at $50,000. When McGee was finally brought before the Justice Court Judge, twelve days after her arrest, for determination of the proper amount of bail, no bail was required, and she was released on her own recognizance. The criminal charges (child abuse) against her were not pursued. However, McGee was not compensated for the twelve days (December 4 through December 16) she was unconstitutionally held in jail for financial inability to make the excessive bail. R., 90-92.

The proposed Amended Complaint seeks relief against Holmes County, Mississippi for the acts of its Justice Court Judge in setting an excessive bail in violation of U.S. Constitution Amendment Eight. R., 90-91. Excessive bail violates the Eighth Amendment, which permits bail to be set only at such amount as is reasonably calculated to assure appearance at trial. *Stack v. Boyle*, 342 U.S. 1 (1951).

United States District Judge Tom S. Lee dismissed the suit on the grounds that, under *Johnson v. Moore*, 972 F. 2d 92 (5th Cir. 1992), a local political subdivision is not liable for judicial acts of its judge. Based on *Johnson v. Moore*, the Fifth Circuit affirmed.

Believing that *Johnson v. Moore* cannot be reconciled with this Court's precedents, McGee filed this Petition.

ARGUMENT I.

THIS COURT SHOULD REVIEW THIS CASE SINCE THE FIFTH CIRCUIT'S HOLDING IN *JOHNSON V. MOORE*, 952 F. 2D 92 (5TH CIR. 1992), THAT A LOCAL GOVERNMENT IS NOT LIABLE FOR INCONSISTENT BOTH WITH *PEMBAUR V. CITY OF CINCINNATI*, 475 U.S. 469 (1986) AND WITH *OWEN V. CITY OF INDEPENDENCE*, 445 U.S. 662 (1980).

Though innocent of any crime, Petitioner McGee was held in jail for 14 days because a Justice Court Judge of Holmes County, Mississippi decided to disregard the United States Constitution Amendment Eight in setting bail. [1] By its terms, 42 USC § 1983 provides a damages remedy for this

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[1] Under Mississippi law, Justice Court Judges (formerly called Justices of the Peace) are granted the final authority to (footnote continued)

violation of constitutional rights. As stated in *Felder v. Casey*, 487 U.S. 131 (1988):

> The central objective of the Reconstruction-Era civil rights statute...is to insure that individuals whose federal constitutional...rights are abridged, may recover damages....

Despite 42 USC § 1983's "central objective" of providing a remedy, the Fifth Circuit has held that McGee has no remedy for being unconstitutionally incarcerated for twelve days. She, of course, cannot sue the judge individually for committing her to jail under an excessive bail since judges are immune, in their individual capacities, for their judicial acts. *Stump v. Sparkman,* 435 U.S. 349 (1978); *Mireles v. Waco*, 502 U.S. ___, 116 L. Ed. 2d 9 (1991). According to the Fifth Circuit, McGee also has no remedy against the County whom the judge represents. The Fifth Circuit rule is that a local government cannot be held liable for the acts of a judge unless the acts are of an "administrative" rather than a "judicial" nature. *Johnson v. Moore*, 952 F. 2d 92 (5th Cir. 1992).[2]

The Fifth Circuit's denying a Plaintiff all remedies when his constitutional rights are violated through the judicial act of a judge cannot be reconciled with *Pembaur.* The question in *Pembaur* was whether a county could be held liable for the

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[1](continued)
set bail for crimes allegedly committed in the counties in which they sit. *Miss. Code Ann.*, § 99-5-11, 99-3-7. They are elected for four year terms, Miss. Constitution, § 171, with the number of judges dependent upon the county's population. *Miss. Code Ann.*, § 99-11-2.

[2]*Johnson v. Moore* held that a municipality cannot be held liable for the unconstitutional acts of a judge in sentencing one to jail without being represented by an attorney, since sentencing is a judicial act.

acts of its county prosecutor. A prosecutor and a judge enjoy the same individual judicial immunity for judicial acts. *Imbler v. Pachtman*, 424 U.S. 409 (1976). But *Pembaur* did not determine the county's liability by deciding whether the prosecutor was carrying out a judicial function. Instead, *Pembaur* held the county's liability depended only upon whether the act in question was that of an official policy-maker who was carrying out a policy decision on behalf of a local government. *Pembaur* inherently rejected the Fifth Circuit's holding in *Johnson v. Moore* that the liability of the county depended upon whether the underlying actor (there, the county prosecutor) was carrying out a "judicial" function. The question, according to *Pembaur,* was whether the decision was made by a person authorized to make policy on behalf of the county. According to *Pembaur:*

> If the decision to adopt that particular course of action is properly made by that government's authorized decision-makers, it surely represents an act of official government policy as that term is commonly understood.

If *Pembaur* be followed, the county must be held liable for the policy acts of the judge in setting an excessive bail. In Mississippi, a Justice Court Judge is vested with the final authority to set bail. *Miss. Code Ann.*, § 99-5-11, 99-3-7. Thus, under *Pembaur,* a county is liable for a final policy decision to set bail in an unconstitutionally excessive amount.

Johnson v. Moore misapplies this Court's precedents. This Court has held that a judge has immunity in his *individual* capacity when his acts are judicial. *Mireles v. Waco*, 502 U.S. ___, 116 L. Ed. 2d 9 (1991); *Stump v. Sparkman*, 435 U.S. 349 (1978). On the other hand, this Court has squarely held that governmental entities, unlike individuals, enjoy no

immunity of any sort. *Owen v. City of Independence*, 445 U.S. 622 (1980). Since *Owen* decisively holds that governmental entities enjoy no immunities, the Fifth Circuit's holding that the governmental entities have the same judicial immunity as do judges disregards this Court's controlling precedent. *Owen* specifically held that governmental entities do not enjoy an individual officer's immunity, since the effect of such a holding would be that "many victims of the constitutional violations" caused by municipalities would be without remedy. By granting the county immunity simply because the judge would be immune, this Court has "left many victims of constitutional violations...." without a remedy. This result frustrates 42 USC § 1983's "central objective" of providing a remedy.

Respectfully submitted,

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DATED: December 19, 1994

7.

NO.

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APPENDIX

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December 19, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

ELOISE MCGEE — PLAINTIFF

VS. — CIVIL ACTION NO. 3:93-CV-57 (L) (C)

KATHERINE FOSTER and
HOLMES COUNTY, MISSISSIPPI — DEFENDANTS

ORDER

This cause is before the court on the application of plaintiff to review the order entered by the magistrate judge denying plaintiff's motion for leave to amend. By the amendment, plaintiff sought to allege liability on the part of Holmes County for acts taken by a justice court judge of that county. The magistrate judge ruled that amendment would be futile in the light of the Fifth Circuit's holding in *Johnson v. Moore,* 952 F. 2d 92 (5th Cir. 1992). On her application for review, plaintiff has not undertaken to show that the magistrate judge's ruling is either clearly erroneous or contrary to law and the court, therefore, finds that the magistrate judge's ruling should be affirmed.[1] Since the request to amend has been denied, and since the complaint as it now stands states no cause of action, it must be dismissed.

Accordingly, it is ordered that the order of the magistrate judge denying leave to amend is affirmed. It is further

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[1]Plaintiff, in fact, concedes that under *Johnson*, amendment would be futile, and further concedes that this court is bound to follow *Johnson*. She contends, though, that the rule espoused by the Fifth Circuit in *Johnson* is contrary to United States Supreme Court precedent and thus advises that she will raise that issue on an appeal to the Fifth Circuit.

ordered that plaintiff's complaint is dismissed for failure to state a claim upon which relief may be granted.

ORDERED this 6th day of December, 1993.

s/s_____

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7791
Conference Calendar

ELOISE MCGEE,

Plaintiff-Appellant,

versus

KATHERINE FOSTER ET AL.,

Defendants,

HOLMES COUNTY, MS,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. CA-3:93-57 (L) (N)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Pursuant to 42 U.S.C. § 1983, Eloise McGee sued Holmes County, Mississippi, alleging that a justice court judge violated state law and McGee's due process rights by setting excessive bail after McGee was arrested for child abuse. McGee sought to amend her complaint to state causes of action under the Eighth and Fourteenth Amendments for denial of due process and excessive bail. The magistrate

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

judge denied the motion to amend as futile, and the district court dismissed McGee's suit for failure to state a claim. McGee challenges the dismissal.

"In reviewing a Rule 12(b) (6) dismissal, this Court accepts all well pleaded arguments as true and views them in the light most favorable to the plaintiff." *Mitchell v. McBryde*, 944 F. 2d 229, 230 (5th Cir. 1991) (internal citations, quotations and alterations omitted). "The dismissal will not be upheld unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (internal quotation marks and citation omitted).

"In a § 1983 action, a municipality may not be held strictly liable for the acts of its non-policy-making employees under a *respondeant superior* theory." *Benevides v. County of Wilson*, 955 F. 2d 958, 972 (5th Cir.), *cert. denied*, 113 S. Ct. 79 (1992). A local governing body "may be liable under § 1983, however, where the alleged unconstitutional activity is inflicted pursuant to official policy." *Johnson v. Moore*, 958 F. 2d 92, 93 (5th Cir. 1992). Municipal liability under § 1983 also may be predicated upon an isolated decision made by a person with power to make policy for the municipality. *Pembaur v. Cincinnati*, 475 U.S. 469, 480, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986). A § 1983 complaint against a municipality must identify the policy, connect the policy to the municipality, and show that the particular injury occurred because of the execution of the policy. *Bennett v. Slidell*, 728 F. 2d 762, 767 (5th Cir. 1984) (en banc), cert. denied, 472 U.S. 1016 (1985).

McGee relies heavily on *Pembaur*. She argues that a county judge in Mississippi is a county policy-making official and that the county is liable for the judge's isolated deci-

sion to set her bail at $50,000. "[A] municipal judge acting in his or her judicial capacity to enforce state law does not act as a municipal official or lawmaker." *Johnson*, 958 F. 2d at 94. This Court distinguishes between the judge's administrative actions, which may constitute official county policy, and the judge's judicial actions, wherein the judge effectuates state policy by applying state law. *See id.*

McGee argues that the decision in *Johnson* is contrary to the Supreme Court's decision in *Pembaur*. While some municipal judges may make more policy than others, the pith of McGee's argument is that the county judge violated her rights in implementing the state bail statute. The setting of bail is a judicial duty. *See Thomas v. Sams*, 734 F. 2d 185, 189-90 (5th Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985). The decision of the district court is AFFIRMED.